In the High Court of Punjab and Haryana at Chandigarh

RSA No.265 of 1980

Date of decision: November 5, 2007

Punjab Wakf Board

…Appellant

Versus

Murti Hanuman Jai

...Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

Present: Mr. Arun Palli, Senior Advocate, with
Mr. Parminder Singh, Advocate,
for the appellant.

Mr. M.L. Sarin, Senior Advocate, with
Mr. Hemant Sarin, Advocate,
for the respondent.

JUDGMENT

M.M. Kumar, J.

This appeal filed under Section 100 of the Code of Civil Procedure, 1908 (for brevity, 'the Code') raises the following substantial question of law:-

> "Whether in the facts and circumstances of the case the property in dispute be regarded as wakf property under the management of the Wakf Board by virtue of Section 66H added by the Wakf (Amendment) Act, 1984?

The appeal was infact decided by this Court vide its judgment dated 30.10.1992 upholding the concurrent findings

recorded by both the Courts below holding that the land could not be presumed to be wakf property merely on the basis of its having been recorded in possession of Idgah and that Wakf could only be created by dedication in writing by a person professing Islam. It was further held that there was no evidence of user since times immemorial which may warrant an inference of dedication. The judgment of this Court dated 30.10.1992 was challenged before Hon'ble the Supreme Court on the ground that this Court did not take into account documents Ex. P-5 to P-17, which are jamabandies commencing from 1915-16 to 1965-66 nor anybody brought those documents to the notice of the Court because apparently no one had appeared for the parties. The judgment dated 13.10.1992 was set aside and the appeal has been remitted back to this Court for fresh disposal in accordance with law. It is how the matter has come up again.

The dispute revolves around a piece of land measuring 10 kanals 6 marlas comprised in Khewat No.683/445, Khatauni No.693, Khasra No. 128 described as *Gair Mumkin Idgah,* vide jamabandi 1965-66, situated in Patti Jhambra, Shahbad Markanda, Tehsil Thanesar, District Karnal (to be referred as disputed land). The Punjab Wakf Board-plaintiff appellant has filed a civil suit on 5.3.1970 claiming possession of the disputed land. It was alleged that the land in dispute is illegally occupied by Murti Hanuman Jai Bekunthpuri Mandi, Shahabad. The trial Court dismissed the suit by recording the findings on various issues. There is Issue No. 2, which is crucial and pertains to 'Whether the property in dispute is Wakf and under the management of the Wakf Board.' The finding recorded on

this issue are:

> "A perusal of Ex. P.5, copy of Jamabandi 1965-66 would show that it stands entered in the column of ownership that the suit property is Idgah Wasa Deh Haza. In the column of cultivation the Hanuman Mandir stands entered. That being so, the documentary evidence would not show that the defendant is in possession of the suit property in any personal capacity. This fits in with the plea taken up by the defendant. The plaintiff has not placed on record any Gazette Notification to show that the suit property vested in the plaintiff.
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> The learned counsel for the plaintiff was not in a position to show me as to at what point of time the suit property came to vest in the plaintiff."

On Issue No. 4 as to 'whether a Mandir exists on the site in dispute and if so what is the duration of its existence and its effect on the maintainability of the suit, it has been held in para 14 as under:-

> "In view of my finding on issue No.2, which is based on documentary evidence, it is held that a Mandir exists on the suit property. The result therefore, is that the suit is not maintainable against the defendant."

Likewise, Issue Nos. 5 and 6 were 'whether the deity has become owner of the disputed property by adverse possession and that the suit is time barred'. It was observed that the issues were not pressed by the learned counsel for the defendant-respondent and

accordingly the same were decided in favour of the plaintiff-appellant. The suit was dismissed with costs vide judgment and decree dated 3.10.1975.

The plaintiff-appellant then preferred an appeal under Section 96 of the Code before the learned Lower Appellate Court. On the crucial Issue Nos. 2 and 4, the findings were challenged and the Lower Appellate Court in its judgment and decree dated 12.10.1979 held that the suit property could not be proved to be public wakf upholding the view taken by the trial Court. The observations in that regard are extracted hereunder, which reads thus:-

> ".....To show that the property vests in the plaintiff, it will have to be proved by the plaintiff that it is a public wakf. A property is a public wakf only if it is created by a person professing Islam by a deed in writing. The said fact can be proved with by pending (sic?) express dedication or by long user of the property as such. In the instant case, the only evidence of user produced is just the documents containing entries from the year 1915-1060(?) which cannot be held to be sufficient proof to show long user. The evidence of dedication is only oral gift by certain persons. There is no evidence that the said person professed Islam. The perusal of mutation Ex. P-19 shows that it was an oral gift meaning thereby that there was no dedication in writing. As such, I am of the view that the suit property is snot proved to be public wakf and trial Court was right in holding that it does not

vest in the plaintiff for purposes of management."

The lower Appellate Court on 12.10.1979 has further held that the plaintiff-appellant failed to satisfy the requirements of law as laid down by Hon'ble the Supreme Court in the case of **Syed Mohd. Salie Labbai (Dead) by L.Rs v. Mohd. Hanifa(Dead) by L.Rs., AIR 1976 SC 1569,** as no ancient document was produced to show that the property has been described as Wakf property. The Court rejected the argument that jamabandi for the year 1915-16 should be accepted as ancient document. Accordingly, it was held that the property in dispute could not be held to be Wakf property.

On the issue as to whether the property could ever vest in the plaintiff-appellant, learned Lower Appellate Court held that there was no evidence that fresh trustees were appointed as per the requirement of Section 11 of the Punjab Wakf Board Act,1954 and proceeded to record the following finding:-

> "In view of the above, the contention of the counsel appears to be correct. There is no evidence adduced that fresh trustees have been appointed. So I am of the view that management also cannot vest in the plaintiff even if it is held to be a wakf property. Counsel for the plaintiff-appellants contended before me that the above authority only relates to an evacuee wakf property. According to him there is a difference between the wakf property and evacuee wakf property. When asked to give an example of any evacuee property which will not come within the

definition of the wakf property, he has not been able to give any example to point out clear distinction. As such I am of the view that the contention of the respondent counsel is correct. So, findings of the trial Court on issue No.2 is liable to be confirmed and is confirmed as such."

The learned Lower Appellate Court further held on Issue No. 4 that the defendant-respondent Murti Hanuman Ji was in possession and would be deemed to be its owner.

Mr. Arun Palli, learned counsel for the plaintiff-appellant has argued that Section 66H of the Wakf Act, 1954 was added in 1984 on the commencement of Wakf (Amendment) Act, 1984. According to the learned counsel the effect of the new provision is that any evacuee property within the meaning of Section 2(f) of the Administration of Evacuee Property Act, 1950 (for brevity, 'the Evacuee Act'), would be governed by Wakf Act, 1954, which immediately before it had became evacuee property and was comprised in any Wakf. He further pointed out that any entrustment made of any such property in particular to the Wakf Board before commencement of 1984 amendment in pursuance to the directions issued by Custodian is always deemed to have and shall always deemed to be governed by Wakf Act. In that regard, learned counsel has placed reliance on a judgment of Hon'ble the Supreme Court in the case of **Punjab Wakf Board v. Bachan Chand, 1988 (Supp) SCC 514,** and argued that the wakf property would vest in the appellant-Board in the same manner and effect as in a trustee of such

property for the purposes of sub-section (1) of Section 11 of the Evacuee Act with effect from the date of such entrustment.

Mr. Palli, has also placed firm reliance on the observations made by Hon'ble Supreme Court in para 28 of its judgment in the case of Syed Mohd. Salie Labbai's case (supra) by urging that once revenue record consistently shows the land in dispute as *Gair Mumkin Idgah* then it has to be regarded as public wakf. If it is a public wakf then it vests in the public and it cannot be divested of its character by non user and would always continue to be so whether it is used for that purpose or not. Referring to the entries in the jamabandis Exs. P-5 to P-15 and P-19, learned counsel has argued that there is a mutation entered as early as on 23.11.1924 with regard to the gift in the name of Idgah together with share in shamlat. The mutation was sanctioned by the Assistant Collector IInd Grade on 23.11.1924. Thereafter vide order dated 25.6.1925 passed by the Collector, Karnal, sanctioning of gift was granted by the Naib Tehsildar. According to the learned counsel it must be regarded as express and explicit dedication. He has then drawn my attention to para 14 of the judgment in the case of Syed Mohd. Salie Labbai (supra) and submitted that all the necessary conditions as laid down by Hon'ble the Supreme Court stands fully satisfied. In support of his submission, learned counsel has also placed reliance on a Single Bench judgment of Patna High Court in the case of **Mohammad Kazim v. Abi Saghir, AIR 1932 Patna 33** and argued that the requirement of a valid wakf is a substantial dedication of the usufruct

of the property to charitable, religious or good purposes and no particular form is necessary. According to the learned counsel substantial dedication must therefore be inferred because it was perpetual, religious, charitable and for good purposes. The dedication is not even required to use the word 'wakf' and may not formally transfer the property to the ownership of Almighty if there is substantial dedication to a valid object then such a property must be considered as wakf. He has placed reliance on Sections 3, 4 and 5 of the Wakf Act,1954.

In order to meet the finding recorded by the learned Lower Appellate Court that document in writing is required for dedicating the property to the wakf, learned counsel has placed reliance on a judgment of the Lahore High Court in the case of **Ram Rup v. Saran Dayal, AIR 1936 Lahore 283** and argued that for the creation of valid wakf no writing is required in the area of Punjab. He has drawn my attention to last two paras of the judgment to substantiate his submission.

Mr.Palli has also submitted that the appeal is maintainable once the findings are shown to be perverse and in that regard he has placed reliance on three judgments of Hon'ble the Supreme Court in the cases of **Karnataka Board of Wakf v. Anjuman-e-Ismail Madris-un-Niswan, (1999) 6 SCC 343; Kulwant Kaur v. Gurdial Singh Mann, (2001)4 SCC 262 and Bondar Singh v. Nihal Singh, (2003)4 SCC 161**.

Mr. M.L.Sarin, learned senior counsel for the respondent has challenged the very maintainability of the appeal by urging that as

to whether the property is wakf property or not is a pure question of fact. Once the concurrent findings have been recorded by both the courts below, it would not be open to this Court to once again enter into such an enquiry and re-determine the question of fact. In support of his submission, learned counsel has placed reliance on a judgment of Hon'ble the Supreme Court in the case of **Karnataka Board of Wakf v. Anjuman-e-Ismail Madris-Un-Niswan, JT 1999 (5) SC 573**. Referring to the observations made in para 10 to 15, learned counsel has submitted that power of this Court to interfere under Section 100 of the Code is limited solely to decide a substantial question of law if at all the same arises in an appeal. He has placed reliance for the aforementioned proposition on another judgment of Hon'ble the Supreme Court in the case of **Pubjab Wakf Board, Ambala Cantt. v. Capt. Mehar Singh, (1975) 2 SCC 643,** wherein it has been held that the property would not become wakf property merely because the word “Idgah” in the demand and collection register concerning rent was used. He has also submitted that the judgment also supports the proposition as to whether the property is wakf property or not is a question of fact.

Mr. Sarin, has then submitted that both the witnesses produced by the plaintiff- appellant did not support its case despite the fact that both of them were employees of the Wakf Board. Referring to the statement made by PW-1 Mohd. Iqbal, Rent Collector and PW-2 Mohd. Iqbal, Field Inspector, learned counsel has submitted that no evidence to prove dedication has been adduced

by the plaintiff-appellant. He has then submitted that a careful perusal of the plaint would show that the plaintiff-appellant has filed a suit for possession in respect of 10 kanals 6 marlas of land whereas a perusal of jamabandi for the year 1959-60 would show that the defendant-respondent was in possession of 3 kanals 4 marlas of land. It has further been submitted that entries in the jamabandi Ex. P-16 for the year 1965-66 would show that the land is in possession of the defendant-respondent and total area shown is 10 kanals 6 marlas.

He has then pressed the application filed under Order 41 Rule 27 of the Code bearing C.M. No. 3392-C of 2007, to place on record the judgment and decree dated 29.10.1981, passed in Civil Suit No. 96 of 1981, instituted on 11.9.1980, by the defendant-respondent against the general public seeking a declaration that the defendant-appellant is absolute owner of the land measuring 10 kanals 6 marlas alongwith temple and no shop is comprised in the same khasra numbers. Learned counsel has submitted that since the judgments are authentic documents, the same can be permitted to be brought on record under Order 41 Rule 27 of the Code. In support of his submission, he has placed reliance on a judgment of Hon'ble the Supreme Court in the case of **Billa Jagan Mohan Reddy v. Billa Sanjeeva Reddy, (1994) 4 SCC 659** and of this Court in the case of **Kartar Singh v. Rajesh Kumar, 1979 (1) RLR 293**. Learned counsel has then argued that the judgment is binding even on the plaintiff-appellant as it is a declaration against the whole world. For that proposition, learned counsel has placed reliance on a judgment of

this Court in the case of **Kaluta (deceased) through his son v. M/s Greater Ashoka Land and Development Company, (2006) PLR 734.**

Mr. Arun Palli, learned counsel has controverted the submission with regard to bringing on record the judgment by submitting that Shri Hari Chand Chadha had been appearing in person in this appeal and a perusal of the judgment would show that the suit was also filed by the defendant-respondent through Shri Hari Chand Chadha. According to the learned counsel, the factum of pendency of this appeal has not been brought on record and, therefore, no benefit of the judgment would flow to the defendant-respondent.

I have thoughtfully considered the submission made by the learned counsel for the parties and have minutely perused the record including the documentary as well as oral evidence. For the sake of convenience it would be appropriate to first discuss the documentary evidence on record. There is a series of documents Exs. P-5 to P-18, most of which are copies of revenue records (jamabandies) showing the name of the owner and cultivator. These reports are prepared every four years. The most significant document in the series is Ex. P-19. This document shows that mutation was entered in respect of land in dispute as early as 23.11.1924 in the name of Idgah together with share in shamlat by Assistant Collector IInd Grade. It was thereafter on 25.6.1925 that the collector, Karnal, passed an order approving the order of the Assistant Collector IInd Grade. The document further shows the name of the owner and the

name of the cultivator as *Ahl-e-Islam*. In column Nos. 8 and 9, new number of the holding in new jamabandi and the name of the owner have been reflected. There is red ink entry showing '*560 Idgah Jumla Ahl-e-Islam*', belonging to all the Mohammedans of Shahabad Town. According to this entry a verbal gift of the land in dispute appears to have been made on 30.6.1924, as is evident from reading of column 13 of this document. Other documents Exs. P-5 to P-17 are the copies of the Jamabandi. According to Ex.P-7 pertaining to the year 1915-16, in column No. 5, names of private persons have been described as owners, which are Ibrahim Khan, Ata Mohammad Khan etc. etc. In column No. 6, name of the culativator has been entered as *Maqbuza Ahl-e-Islam* under the possession of the Mohammadans. The Khasra number of the present settlement under column No. 9 has been described to be 2111 Idgah and the area is 6-4 *Gair mumkin Idgah*. The position is similar in Ex. P-8, which is Jamabandi for the year 1919-20 and Ex. P-9 pertaining to the year 1923-24, Ex. P-10 pertaining to the year 1927-28, Ex. P-11 pertaining to the year 1931-32, Ex. P-12 pertaining to the year 1935-36, Ex. P-13 pertaining to the year 1939-40 and Ex. P-14 pertaining to the year 1943-44. However, for the first time in the Jamabandi for the year 1959-60, Ex.P-15, name of the cultivator in column No. 6 as Hanuman Mandir (*Gair Maurusi*) has appeared whereas the name of the owner in column No.5 is stated to be Idgah. In column No. 9, the entry continues to be 2111 Idgah and in column No. 10, same area of 6-4 is shown as *Gair Mumkin* (3-4) and *Barani*

(3-0). Similar is the position of the entries in the Jamabandi for the year 1965-66, Ex. P-16 and Khasra Girdawari Ex. P-17.

The oral evidence is based on the statements made by two witnesses produced by the plaintiff-appellant, namely, PW1 Mohd. Iqbal, Rent Collector, and PW2 also named Mohd. Iqbal, Field Inspector. The statements made in examination-in-chief and cross-examination by both the witnesses would show that they have claimed the land in dispute to be Idgah but none of them were able to depose that they have seen the land being used as Idgah for rendering prayer (*Namaz*). In other words, there is no evidence on record showing that the property in dispute has ever been used as Idgah or prayer has ever been rendered by the Muslim population at this place. The oral statement in examination-in-chief, made by the witnesses that *Namaz* is rendered at this place was completely demolished in the cross-examination when they have conceded that they have never seen *Namaz* being rendered by the Muslim population.

On the basis of the aforesaid evidence, it has not been established that there was dedication in writing of the property in dispute by a person professing Islam. It has also not been proved that the oral gift made by someone for erection of Idgah has by prescription acquired the status of a wakf property as no evidence of its user, has been produced. In that regard reliance may be placed on a judgment of Hon'ble the Supreme Court in the case of Capt. Mehar Singh (supra). In the last para of the judgment, while noticing the concurrent findings their Lordships' of the Supreme Court have observed that there was 'no evidence that the property in question

was used as wakf property'. There is no dedication of the property to be wakf property. There is no evidence that the property was determined to be wakf property by the Custodian. In that case the Wakf Board has filed the suit for possession of a plot of open land claiming the same to be a wakf property being Idgah. It was also claimed that the plot was transferred to the Board by the Custodian of Jalandhar. The defendant-respondents in that case were alleged to be in unlawful occupation of the plot of land after the partition of the country. Despite the fact that a notification dated 27.2.1961 issued by the Home Secretary, it was found that there was no evidence to indicate that the property in suit is a wakf property. The exercise of power by the Board under the Wakf Act in respect of Muslim evacuee properties in trust does not establish and identify the property in suit to be wakf property. Dismissing the appeal filed by the Wakf Board and upholding the concurrent findings, it was observed that in the absence of any evidence that the property in question was used as wakf property or the property was determined to be wakf property by the Custodian, it could not be considered to be Idgah.

The position is not different in the present case. The concurrent findings recorded by both the Courts below are that the property could not be held to be a public wakf and/or Idgah. It is well settled that the question whether a property is a wakf property is necessarily a question of fact, as has been held by Hon'ble the Supreme Court in the case of Karnataka Board of Wakf (supra). Hon'ble the Supreme Court after referring to the definition of expression '*Wakf* in Section 3 of the Wakf Act has held that it is a

pure question of fact. Moreover, in order to succeed, the plaintiff-appellant was required to prove dedication of the property by a person professing Islam or oral dedication as in the present case followed by its continuous use. In that regard, reliance may be placed on a judgment of Privy Council in the case of **Ballabh Das v. Nur Mohammad, AIR 1936 PC 83**. In that case, it was held that the question as to whether a graveyard could be considered as a public graveyard has to be proved by illustrations of burial by public at large. The aforementioned judgment of Privy Council has been relied upon by Hon'ble the Supreme Court in the case of Mohd. S. Labbai (supra). The extract of para 28, which is relevant reads thus:-

> ".....The Mohammedan Law on the subject is very clear. Under the Mohammedan Law the grave-yards may be of two kind-a family or private grave-yard and a public grave-yard. A grave-yard is a private one which is confined only to the burial of corpses of the founder, his relations or his descendants. In such a burial ground no person who does not belong to the family of the founder is permitted to bury his dead. On the other hand, if any member of the public is permitted to be buried in a grave-yard and this practice grows so that it is proved by instances adequate in character, number and extent, then the presumption will be that the dedication is complete and the grave-yard has become a public grave-yard where the Mohammedan public will have the right to

> bury their dead. It is also well settled that a conclusive proof of the public grave-yard is the description of the burial ground in the revenue records as a public grave-yard. ……"

When the principles laid down by Hon'ble the Supreme Court in the case of Mohd. Salie Labbai (supra) are applied to the facts of the present case then it becomes evident that in order to become a public property a dedication has to be used as such. Mere one use of such a property would not result into declaring such a property as a Public Wakf. If it is not possible to hold that grave-yard became public wakf by single use as was the factual position in Mohd. Salie Labbai's case (supra) then it would also not be equally possible to hold in the case of Idgah. Moreover, there is no evidence brought on record that a dedication was made by a person professing Islam by a deed in writing. Still further there is no determination by the Custodian that the property in the hands of the Board was wakf. Therefore, there is complete lack of evidence to sustain the claim made by the plaintiff-appellant. Even otherwise, neither any order has been passed by the Custodian of the property under the Evacuee Act to show handing-over of property to the Board as a Trustee nor any gazette notification to that effect has been issued as per requirement of Section 66H of Wakf Act, 1954. Therefore, it becomes doubtful whether the plaintiff-appellant was entitled to maintain the suit against the defendant-respondent. It is further pertinent to point out that there has not been any declaration deed under Section 7 of the Evacuee Act and accordingly, the question of

law posed in the first para has to be answered against the plaintiff-appellant.

The argument of the learned counsel based on Section 66H of the Wakf (Amendment) Act, 1984, would not require any detailed consideration because under Section 66H a property is presumed to be evacuee within the meaning of Section 2(f) of the Evacuee Act and then by virtue of provisions of Section 5, notification by publication of wakf property is required to be issued. Sections 5 and 66H are reproduced hereunder for facility of reference:-

> "5. Publication of list of wakfs.- (1) On receipt of a report under sub-section (3) of section 4, the State Government shall forward a copy of the same to the Board.
>
> (2) The Board shall examine the report forwarded to it under sub-section (1) and publish, in the Official Gazette, a list of wakfs in the State, or as the case may be, the part of the State, whether in existence at the commencement of this Act or coming into existence thereafter to which the report relates and containing such particulars as may be prescribed."
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> X X X X X
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> "66H. Special provision as to evacuee wakf properties. – The provisions of this Act shall apply, and shall be deemed always to have applied, in relation to any evacuee property within the meaning of clause (f) of

section 2 of the Administration of Evacuee Property Act, 1950 which immediately before it became such evacuee property within the said meaning was property comprised in any wakf and, in particular, any entrustment (whether by transfer of any documents or in any other manner and whether generally or for specified purposes) of any such property to a Board made before the commencement of the Wakf (Amendment) Act, 1984 in pursuance of the instructions of the Custodian under the Administration of Evacuee Property Act, 1950 shall have, and shall be deemed always to have had, notwithstanding anything contained in any other provision of this Act, effect as if such entrustment had operated to-

(a) vest such property in such Board in the same manner and with the same effect as in a trustee of such property for the purposes of sub-section (1) of section 11 of the Administration of Evacuee Property Act, 1950 with effect from the date of such entrustment, and

(b) authorise such Board to assume direct management of the wakf concerned for so long as it might deem necessary."

A bare perusal of Section 5 shows that a preliminary survey of wakf property may be undertaken by the Survey

Commissioner, as provided by Section 4 and on the receipt of such report, the State Government is supposed to send the report to the Wakf Board. Thereafter the Wakf Board is to examine the report and publish the same in the official Gazette. If the property has been declared as wakf by publication of notification then it could be presumed as such and its management may vest in the Wakf Board. The amendment made in the year 1984 has made only one difference that by virtue of Section 66H such property could be treated to have vested in the Wakf Board with effect from the date of its entrustment to the Board. The Wakf Board, thus, would be entitled to maintain suit for possession of the property and the civil court has jurisdiction to entertain the suit under Section 15(1) read with Section 15(2) of the Wakf Act, 1954. In that regard reliance may be placed on judgment of Hon'ble the Supreme Court in the case of Bachan Chand (supra). Therefore, I find that the plaintiff-appellant cannot take any advantage of the amendment carried in 1984 as there is no Gazette notification on record showing that the property has ever vested in the Wakf Board. It is true that in Abi Saghir's case (supra), Hon'ble Patna High Court and in Saran Dayal's case, the Hon'ble Lahore High Courts have held that no written dedication is required or writing in particular form is required. But it is not observed that in the absence of evidence of user also oral dedication is sufficient. The evidence in form of Exhibit P-19 shows oral dedication which remains unsubstantiated because it leaves to many inferences to be assumed in favour of the plaintiff-appellant. In any case no inference

of user for the purpose Idgah and for rendering prayer could be raised. Therefore, those judgments are of no help of the plaintiff-appellant.

In view of the above discussion the question of law raised by the plaintiff-appellant has to be answered against it and in favour of the defendant-respondent. There is thus no merit in the appeal and same is accordingly dismissed.

(M.M. KUMAR)
JUDGE

November 5, 2007
sn/Pkapoor